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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-22

LEWIS VINCENT D'AVANZO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit, as follows:

A. Opinions Below.

The United States Court of Appeals for the Second Circuit by judgment entered therein on June 9, 1971 (Docket No. 71-1012), unanimously affirmed a judgment of the United States District Court for the Eastern District of New York convicting this petitioner and his co-defendant

(Vincent Anthony Falcone)* of unlawful possession of mercury cylinders stolen from interstate shipment in violation of 18 U.S.C. § 659, transporting a stolen truck in interstate commeree in violation of 18 U.S.C. § 2312, and transporting stolen mercury in interstate commerce in violation of 18 U.S.C. § 2314. The case was tried by a jury before the Hon. Joseph C. Zavatt, a District Judge of said Court.

The opinion of the United States Court of Appeals for the Second Circuit (not yet officially reported), is set forth in Appendix A hereto. There were no other written opinions in connection with the case.

B. The Grounds on which the Jurisdiction of this Court is Invoked.

Jurisdiction of this Court is invoked under Title 28, § 1254, subdivision 1 of the United States Code, and under Rule 19, subdivison 1, of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on June 9, 1971.

C. The Questions Presented for Review.

(1) Was the warrantless search of the truck and its seizure along with its contents, in violation of the Fourth Amendment so as to require the evidence as to the truck and its contents to have been suppressed?

(2) Was it prejudicial error for the trial Court to inform the jury that as a result of the unlawful arrest of petitioner

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* It is anticipated that Falcone's counsel will also file a petition for certiorari.

D'Avanzo by the Watertown Police, statements that might have been made by him thereafter could not be admitted into evidence at the trial?

(3) Did the Court below err in refusing petitioner D'Avanzo's request to charge the jury that they might acquit him if they found that he divested himself of the truck and its contents upon learning that the property was stolen?

(4) Was the evidence sufficient in law to establish beyond a reasonable doubt that D'Avanzo knew the truck or the mercury were stolen?

(5) Was the prosecutor's summation inflammatory and prejudicial to a fair trial for petitioner D'Avanzo?

D. Constitutional Provisions and Statutes Involved.

(1) The constitutional provision involved is the search and seizure provision of the Fourth Amendment to the United States Constitution. The statutes involved are 18 United States Code, §§ 659, 2312 and 2314.

Each of the foregoing is set forth verbatim in Appendix C to this petition.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented.

Petitioner and a co-defendant, one Vincent Anthony Falcone, were indicted in the United States District Court for the Eastern District of New York under Indictment No. 69 CR 370.

The indictment charged both defendants jointly with four counts as follows:

Count One:

Knowingly possessing a quantity of mercury stolen from a foreign shipment (Title 18 U.S.C. §§ 659, 2).

Count Two:

Knowingly transporting a stolen vehicle in interstate commerce (Title 18 U.S.C. §§ 2312, 2).

Count Three:

Knowingly transporting stolen goods (mercury) in interstate commerce.

Count Four:

Knowingly concealing goods stolen from a foreign shipment.

Trial was held before Hon. Joseph C. Zavatt, then Chief Judge of the United States District Court for the Eastern District of New York and a jury.

Immediately prior to trial a pre-trial hearing was held with respect to a motion made by petitioner D'Avanzo to suppress the evidence of the truck and its contents and any leads obtained therefrom upon the ground that such evidence was the result of a search and seizure in violation of the Fourth Amendment. That motion was denied to the extent of suppressing the evidence of the truck and its contents. The Court, however, suppressed evidence of any statements which might have been made by the petitioner and his co-defendant, arising from their arrest upon a disorderly conduct charge by the Police of Watertown, Connecticut. These pre-trial hearings were held on September

14th and 15th, 1970. On September 21, 1970 the Court rendered its oral decision on the motion to suppress evidence as aforesaid.

The trial was commenced on September 21, 1970 and ended on September 29, 1970 by the verdict of the jury finding each of the petitioners guilty under Counts One, Two and Three. (Count Four was not submitted to the jury).

Thereafter, petitioner D'Avanzo was sentenced to concurrent prison terms aggregating ten (10) years and petitioner Falcone was sentenced to concurrent prison terms aggregating five (5) years.

The factual basis of the prosecution's case where that D'Avanzo and Falcone were observed by F.B.I. agents leaving a scrap yard in Staten Island with a truck which appeared to be heavily laden although the agents had no knowledge of what was contained in the truck. The agents followed the truck along various public highways until the truck ultimately came to a stop and was lawfully parked on a street in Watertown, Connecticut. D'Avanzo was alleged to have been the driver of the truck and Falcone the passenger. D'Avanzo and Falcone were observed by the agents to have left the truck. This was now approximately 2:35 A.M. At this point, one of the agents climbed up the sides of the truck and peered into it over the open top, observing what appeared to be cylinders containing a then unknown chemical partially exposed under a tarpaulin. Approximately 20 minutes later, D'Avanzo and Falcone were placed under arrest separately and in different parts of the town by local Watertown Police upon a charge of disorderly conduct.

Later that morning the truck was impounded by the Watertown Police and a further search conducted by F.B.I. agents which revealed that the truck and its contents had been previously stolen. Some months later D'Avanzo and Falcone were indicted upon the charges which are the subject of this petition.

The detailed facts are set forth at length in the arguments relied on, *supra,* and accordingly, are not reiterated herein.

F. Basis for Jurisdiction in the United States District Court.

The jurisdiction of the United States District Court for the Eastern District of New York was invoked upon the ground that the crimes charged as aforesaid was a violation of federal law, allegedly committed within the Eastern District of New York.

G. Argument Amplifying the Reasons Relied on for the Allowance of the Writ.

POINT ONE

The warrantless search of the truck, and its seizure along with its contents, was in violation of the Fourth Amendment. The evidence as to the truck and its contents should have been suppressed.

The Court below held pre-trial hearings pursuant to a suppression motion by petitioner D'Avanzo. At the conclusion thereof, the Court denied that part of the motion which sought to suppress evidence of the truck and its contents consisting of allegedly stolen vials of mercury. The denial was predicated upon two grounds: (a) there was probable cause to believe the truck contained stolen mercury and (b) it was abandoned by appellants prior to the search and seizure.

We, therefore, consider seriatim each of these two grounds.

(a) Did the F.B.I. agents have probable cause to believe the truck in which appellants were driving contained stolen mercury?

It is our position herein that the validity of the search of the truck in question is dependent upon the events which led to the search of the interior of truck made by Agent Hays on Bussmey Avenue in Watertown, Connecticut a few minutes after it was parked there at about 2:35 A.M. on June 6, 1969.

More particularly, it is contended that the aforementioned search was made without probable cause to believe that the stolen mercury would be found therein. (*Dyke* v. *Taylor Implement Mfg. Co.; Inc.*, 391 U.S. 216 [1967]; *Chambers* v. *Maroney*, 90 S. Ct. 1975 [1970]).

The search was concededly made without a warrant, nor was any arrest made for any federal crime until several months later. Counsel for the government conceded that the search and seizure was not made pursuant to an arrest upon probable cause, but claimed, rather, that the truck and its contents were abandoned by appellants.

The arrest of defendants D'Avanzo and Falcone some fifteen or twenty minutes later for disorderly conduct by town police officers was unrelated to the search and in any event was made about a mile from the location of the truck. Thus, the search—being "too remote in time and place"—cannot be justified as an incident of the arrest for disorderly conduct. (*Preston* v. *U.S.*, 376 U.S. 364, 368 [1964]).

We turn now to a consideration of the facts which led to Agent Hays' search of the truck and his resulting discovery of the mercury vials in the body of the truck.

On the evening of June 5, 1969 he received communication from another agent, George Moresco, in the vicinity of the Caton Scrap Metal Company in Staten Island. He arrived there at about 8:00 P.M. and positioned himself nearby in his car so as to be able to observe any vehicles entering or leaving the premises. He did not yet know that Moresco intended to undertake a surveillance of a truck.

(Hays, like Moresco, was assigned to an investigation concerning a hijacked quantity of mercury on June 3, 1969 near the Staten Island piers. The tractor and trailer containing the mercury at the time of the hijacking had been recovered on Staten Island. The whereabouts of the mercury itself was still unknown. Hays' efforts to locate it had thus far been unsuccessful.)

While thus keeping watch on the entrance to the Caton Scrap Metal yard, Hays observed a truck leaving the yard. He radioed that information to Moresco who told him to institute a surveillance upon it.

At that point, Hays did not observe the occupants.

Hays followed the truck from Staten Island until it ultimately reached the town of Watertown, Connecticut where it came to rest in a parked position on a street known as Bussmey Avenue.

The truck traveled to Watertown via the Goethals Bridge into the New Jersey Turnpike along Route 46 onto the George Washington Bridge, the Cross-Bronx Expressway and the Connecticut Turnpike. The surveillance was conducted with various agents in several cars.

Hays first observed petitioners at the Goethal's Bridge toll booth. They were not known to him. He also observed them several times along the route to Watertown. At the hearing he identified D'Avanzo as the driver and Falcone as the passenger.

Along the route, near Darien, Connecticut, Moresco discontinued his own part in the surveillance. Hays, although unuaware of Moresco's departure, continued to follow the truck into Watertown.

The truck reached Watertown at about 2:00 A.M. on the morning of June 6, 1969. Hays kept it under observation until it ultimately slowed down and stopped in a parked position on Bussmey Avenue in Watertown.

When the truck was parked, he saw the lights of the truck go out. He then had a conversation for a few minutes with some of the other agents. His car was parked nearby on Falls Avenue. During this period of time, he did not have the truck under observation.

Within a few minutes he next observed two men emerge from Bussmey Avenue on to Falls Avenue. Hays at that point was standing on Falls Avenue about 30-40 yards away. The two men were walking towards him in the middle of the street. They changed directions and started to trot into a wooded area nearby.

Hays did not identify himself to them in any way. He was dressed in ordinary civilian clothes. His car and another government car, both unmarked, with motors running, were parked there. One of the cars had its headlights on. Hays did not know if the men knew who he was or whether they might have thought they were being hijacked themselves.

Hays did not know if the two men whom he saw emerge from Bussmey Avenue were the same two men he had observed in the truck.

Hays thereupon got into his car and drove it to a point behind the truck. He immediately got out and climbed onto the hood of his car and shone a flashlight on the rear of the truck. He could not see too well, so he climbed up on the side of the truck itself and shone the flashlight into the interior of the truck body.

The truck body was an open-topped dump-type body, which rested on the rear of the truck behind the cab portion. It was made of steel, completely enclosed on all four sides. A door on one of the sides could be opened by means of a latching device.

The sides extended vertically to a height of about ten (10) feet above the ground, such that an ordinary person standing on the street could not look into the body unless he climbed onto the truck and stood on a ledge running along the sides of the body.

Hays, having thus climbed onto the ledge, placed his head in such a position that he could, for the first time, see the contents of the interior of the truck body with the aid of his flashlight.

Prior to looking into the body of the truck as above described, Hays had no knowledge of the contents thereof. *It was his testimony that he undertook the surveillance for the purpose of learning the contents of the truck for whatever they might have turned out to be.*

Hays examination of the interior of the truck body disclosed several metal cylinders of the type that holds chem-

icals and similar substances. There were no markings on them. The rest of the contents were covered with a tarpaulin.

Upon making these observations, Hays returned to his car and began to cruise the area to locate the men who had brought the truck there and to see if they were the men who had been seen on the street a few minutes earlier. He left the other agents there with instructions to continue watching the truck.

About ten minutes later he came upon Ptl. Kennedy of the Watertown Police Department and assisted him in effecting an arrest of D'Avanzo upon a local disorderly conduct charge. Hays did not arrest D'Avanzo or charge him with violating any federal law.

D'Avanzo was brought to the station house and booked upon the disorderly conduct charge, as was Falcone who was arrested by a different officer some distance away. D'Avanzo was in custody all night and until sometime after 10:00 or 11:00 A.M. the next morning.

The following morning the truck was impounded at about 10:30 A.M. by Detective D'Amico of the Watertown Police Department.

D'Amico testified that he was ordered by Deputy Police Chief Ciriello to impound the truck "and assist Federal Agents in any way possible and inventory a vehicle".

Pursuant to these instructions, he allowed the Federal Agents there to photograph the interior and exterior of the truck, take fingerprints, and generally inspect and "process" the truck and its contents.

The search of the vehicle begun earlier was thus continued in greater depth later that morning.

It is, therefore, urged that the events disclosed at the hearing did not justify the warrantless search begun on Bussmey Avenue at 2:30 A.M. and continued later that day.

The focal point is the events leading up to the search at 2:30 A.M. by Agent Hays. If the agents had no probable cause to search at that time then the entire search must be held invalid. It is now axiomatic that the product of an unlawful search, as well as any leads obtained therefrom, must be suppressed. Nor does a search, unlawful when undertaken, become lawful by virtue of subsequent events. (*U.S. v DiRe*, 332, U.S. 581; *Silver Thorne Lumber* v. *U.S.*, 251 U.S. 385).

At bar, Agent Hays acted on pure suspicion. He began his surveillance at the behest of Agent Moresco. When he ultimately made his search of the truck he still did not know any more than when he began. He admittedly did not know that the contents of the truck were, nor did he have any reasonable basis to believe it contained the stolen mercury he was seeking.

The fact that defendants left the truck lawfully parked on a residential street is no basis for believing the truck had stolen mercury on it.

The two men Hays saw running out of the street were not even identifiable as the men who were in the truck. Hays searched the truck before he knew what had happened to the men who parked it. The record is still barren of proof that the men who entered the wooded area were the ones later arrested by the local police on the streets of Watertown. Even so, those acts would not give rise to a reasonable belief that the truck contained stolen mercury.

Agent Moresco himself acknowledged that when he commenced the surveillance of the truck in Staten Island all he knew was that it was very low on the axle and "apparently laden with some type of goods", the nature of which was unknown to him. He did not know what was in the truck or whether it was stolen or not stolen. He had no knowledge or information as to where the stolen mercury was or who had it, except that it might still be on Staten Island.

Moresco conceded that it would not be unusual for Falcone's truck (Falcone being in the scrap metal and salvage business) to be thus heavily laden as observed by Moresco.

He went on to testify that the purpose of his surveillance was to ascertain whether the contents of the truck was the stolen mercury or whether it was something else. During his surveillance up as far as Darien he still had no idea whether the truck was carrying the stolen mercury or an entirely innocent cargo. The surveillance did not increase his knowledge in any way.

The prior interview nine months earlier by Moresco of Falcone as to Moresco's "information" that Falcone was involved with some allegedly stolen mercury is of no significance in the issue of probable cause. The record does not disclose the source of the "information" or its reliability and, in any event, the investigation was fruitless. Indeed, Morsco never was even able to ascertain if there was any mercury stolen in the first place. Moreover, the record does not indicate that Hays was at all aware of this earlier investigation.

Where a search is made of a vehicle upon less than probable cause to belive it is carrying contraband, the search

violates the Fourth Amendment and the product of the search must be suppressed (*Dyke* v. *Taylor*, supra) such is the situation at bar. The prosecutor himself acknowledged that the search was not predicated upon probable cause to arrest but, rather, upon the seizure of allegedly abandoned property.

> (b) Does the evidence adduced meet the prosecution's burden of proving its claim that the truck and its contents were abandoned and, therefore, beyond the protection of the Fourth Amendment?

The theory of the prosecution was that the search was justified upon the ground that the truck was abandoned (*Abel v. U.S.*, 362 U.S. 217).

It is respectfully submitted that the evidence does not warrant such a conclusion. The truck was lawfully parked on the street at about 2:30 A.M. It was impounded by the Watertown Police Department at about 10:30 A.M.—some eight hours later—on the theory that it was "abandoned" in violation of State law (24).

It appears that Section 150 of Title 14 of the Connecticut Statutes governs the right of police departments to impound vehicles when a person "wilfully and deliberately abandons any motor vehicle within the limits of any highway . . . for a period *longer than 24 hours* . . ." (underlining supplied for emphasis).

The 24 hour limitation prevents a finding of abandonment when the vehicle in question was parked lawfully for an eight hour period—as is the fact here. Thus, the truck cannot be deemed "abandoned" under Connecticut law for the purpose of justifying the instant search.

With respect to the events of the search at 2:30 A.M., the claim of abandonment is even less tenuous. Within three or four minutes of the lawful parking of the vehicle, the search was already begun. The sole theory of claiming abandonment was that the driver and passenger had gone somewhere without the agents observing where they went and that two other individuals (not then known to be the defendants) were seen running out of the street. There was no "hot pursuit" here, since the surveillance was conducted secretly and, so far as the record discloses, without the knowledge of defendants.

In *U.S.* v. *Cowan,* 396 F.2d 83 (2 Cir., 1968), Chief Judge Lumbard, in considering the test to be applied to the validity of a search based on a claim of abandonment stated at Page 87:

> "Appellant argues that the abandonment doctrine does not apply because there was no unambiguous act of intentional discard, as in Abel v. United States, 362 U.S. 217, 241, 80 S. Ct. 683, 4 L.Ed.2d 668 (1960) and Feguer v. United States, 302 F.2d 214, 248 (8th Cir.), cert. denied, 371 U.S. 872, 83 S.Ct. 123, 9 L.Ed2d 110 (1962). Abandonment does not require performing a ritual; rather it is a question of intent. International News Service v. Associated Press, 248 U.S. 215, 240, 39 S.Ct. 68, 63 L.Ed. 211 (1918). The New York Court of Appeals has stated the test of abandonment as follows:
>
> 'The abandonment of property is the relinquishing of all title, possession, or claim to or of it—a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away.' Foulke v. N.Y. Consol. R.R. Co., 228 N.Y. 269, 273, 127 N.E. 237, 238, 9 A.L.R. 1384 (1920)."

It is, therefore, respectfully submitted that the evidence at bar does not authorize a finding that the truck was abandoned.

POINT TWO

It was Prejudicial Error for the Trial Court to Inform the Jury that as a result of the Unlawful Arrest of Petitioner D'Avanzo by the Watertown Police, Statements that might have been made by him thereafter could not be Admitted into Evidence at the Trial.

In the course of deciding the aforementioned pre-trial motion to suppress evidence, the Court below held that any statements made by petitioners following their unlawful arrest for disorderly conduct by the Watertown Police could not be introduced at the trial.

During the course of the trial, the Government called as a witness Sergeant Michael Esso of the Watertown Police Department.

Esso testified, in essence, upon his direct examination that on June 6, 1969, at about 5:00 A.M., he saw Falcone walking along the street, Esso stopped him and questioned him as to his name and where he was going. Falcone gave him his name and stated that he was heading for his sister's home in Westhaven which was 25 or 26 miles away. Falcone further stated that his car had broken down a few miles away. Esso told him he was headed in the wrong direction. Falcone then stated that he had been drinking and was intoxicated. Although Falcone did not appear to Esso to be intoxicated, he nonetheless arrested him upon a charge of disorderly conduct and intoxication.

At this point in Esso's direct examination, counsel for appellant Falcone requested the Court to instruct the jury that the arrest was illegal. The following occurred *in the presence of the jury*:

> "Mr. Kestnbaum: Your Honor, at this point I ask Your Honor to instruct the jury it was illegal arrest.
> The Court: I must tell you, ladies and gentlemen, that I conducted a pretrail hearing and I ruled if a person is running down the street or is walking on the street at 5:00 o'clock in the morning, or 3:00 o'clock in the morning, that I do not think that is a crime of disorderly conduct, and therefore when both of these defendants were arrested on that charge by the Watertown police that any statements that may have been made by either of these defendants after they were placed under arrest would not be admissible on this trial.
> Mr. Sonenshine: If the Court please, I now respectfully move for the direction of a mistrial by the withdrawal of a juror upon the grounds that Your Honor has indicated to the jury that there were or might have been statements made by the defendants that Your Honor has excluded.
> The Court: Motion is denied.
> Mr. Sonenshine: That amounts to a comment upon the failure of the defendant to testify or—
> The Court: Not at all. I deny your motion.
> Mr. Sonenshine: Exception, if Your Honor please.
> The Court: My hearing was not held for the purpose of determining whether the arrest was lawful or not. It was held for the purpose of determining whether any evidence, if any, following the arrest, could be admitted. Go ahead.
> Mr. Lynch: I have no further questions.

Mr. Sonenshine: I renew my motion in view of Your Honor's last statement.
The Court: Motion denied.
Mr. Sonenshine: Exception."

Such an announcement by the Court to the jury hearing the case was patently prejudicial in nature, carrying with it the clear implication that there exists dehors the record a statement (inferentially inculpatory) by the defendant which the Court could not allow the jury to know about, because of a "technicality" arising out of the improper arrest.

Certainly, had the prosecutor made such an announcement to the jury during his summation, for example, it would be deemed so prejudicial as to require a new trial.

See, e.g., *Garris* v. *U.S.*, 390 F.2d 862 (D.C. Cir., 1968);
Kitchell v. *U.S.*, 354 F.2d 715 (1st Cir., 1965);
U.S. v. *Lefkowitz*, 284 F.2d 310 (2 Cir., 1960);
Ginsberg v. *U.S.*, 257 F.2d 950 (5 Cir., 1958).

Analogously, the prejudice to a defendant on a trial is necessarily fatally multiplied when the Federal Judge presiding over the trial makes such a gratuitous remark to the jury.

Nor it is to be overlooked in the particular context of this case that appellant D'Avanzo (whose counsel made no request to instruct jury on the illegality of the arrest) had actually made no post-arrest statement in any event. The arresting officer, Kennedy, had testified at the pre-trial sup-

pression hearing that following his arrest of D'Avanzo, he gave the required Miranda warning to D'Avanzo and that D'Avanzo made no statement.

Thus, the trial Court, knowing that D'Avanzo had made no post-arrest statement, nonetheless implied to the jury that he might have made one but that it would be kept from them!

We, therefore, respectfully urge that the trial Court's quoted instruction to the jury was so prejudicial to petitioner D'Avanzo as to require a new trial.

POINT THREE

The Court Below Erred in Refusing Petitioner D'Avanzo's Request to Charge the Jury that they might Acquit him if they found that he Divested Himself of the Truck and its Contents upon learning that the Property was Stolen.

The prosecution, while adducing direct evidence of the theft of the truck and its contents, and direct evidence of D'Avanzo's possession thereof, relied exclusively upon indirect, circumstantial evidence with respect to the issue of knowledge of the stolen character of the property.

Essentially, the Government's case on the issue of such knowledge derived from (1) the fact of possession of the recently stolen truck and its contents during the drive from Staten Island to Watertown; (2) the parking of the truck in Watertown and (3) the events surrounding the arrest for disorderly conduct shortly after appellants left the parked truck.

It is, of course, axiomatic that a person who possesses stolen property without knowing it to have been stolen does not thereby commit a crime. (*Wolf* v. *U.S.*, 290 F.2d 738, Cir. 1923).

We believe it to be equally axiomatic that a person who initially possesses stolen property innocently and then, upon discovering that it had been stolen, forthwith divests himself of that possession, also does not commit the crime of unlawfully possessing stolen property. Were the law otherwise a person possessing property without being aware of its stolen character, would *ipso facto* become a criminal upon learning that the property was stolen.

At bar, the basic evidence was that petitioners drove the truck and its contents (neither of which could be known to be stolen by mere visual examination) from Staten Island to Watertown. Arriving in Watertown, they parked the truck and left it there.

The entire thrust of D'Avanzo's defense—and so argued in summation—was that if D'Avanzo ever knew or surmised that he was transporting stolen property, such knowledge or surmise first came to him on reaching Watertown whereupon he parked the truck and left it there, thus, divesting himself of its possession.

Counsel for D'Avanzo argued to the jury (723-724):

> "Again, that one question in this case, When Lewis D'Avanzo started to drive the truck off Staten Island, did he know he dealt with stolen merchandise, that he carried stolen mercury on the truck, and the truck was a stolen truck to boot? Is there evidence beyond a reasonable doubt for that? I assure you, not. And if he saw all of the signs going on to Watertown and he thought to himself, I got stolen merchan-

dise, or maybe—does he become a criminal because he walks away? Not if he walks away. That is not what makes him a criminal. The entire case on that question is—that is the only real question as far as Lewis D'Avanzo is concerned."

The importance of this issue—the point in time when knowledge or belief of the stolen character of the property came to D'Avanzo—gave rise to a specific request to charge the jury on that aspect of the case. Its purpose was to fairly direct the jury's attention to the factual nature of the defense and the law applicable thereto.

The request reads in its entirety as follows:

"Requests to Charge On Behalf of Defendant D'Avanzo"

Defendant D'Avanzo respectfully requests the Court to charge the jury in words or substance as follows:

1. 'If the jury has a reasonable doubt as to whether defendant D'Avanzo ever actually knew the truck or the merchandise thereon was stolen, or, alternatively, it appears that defendant D'Avanzo might not have known beyond a reasonable doubt whether the truck or the Mercury was stolen until he reached Watertown and thereafter, within a reasonable time after acquiring such knowledge, did dispossess or abandon the truck and its contents he is entitled to the benefit of such reasonable doubt and should be acquitted.' Respectfully Submitted, William Sonenshine, Attorney for defendant D'Avanzo."

The Court refused to so charge the jury for the reasons appearing in the following colloquy:

"The Court: All right, Mr. Sonenshine.

Mr. Sonenshine: I hand up to your Honor a written request to charge the jury, and if your Honor will permit I would like to read it into the record as well. It's one request.

The Court: I am not going to give it in this language, I am going to explain to the jury what are the essential elements of each crime charged in each count of the indictment, and advise the jury, as I have already explained to them, that if the government fails to prove beyond a reasonable doubt any one of the essential elements, then their verdict must be not guilty.

Mr. Sonenshine: I should point out to your Honor that I think what a jury may do in circumstances where the charge involves either possession or concealment of stolen merchandise is that they may take into account that the mere possession assuredly is not the crime and—

The Court: I think they have to take into account, Mr. Sonenshine, all of the evidence that they hear and believe, and I will not charge in these specific words.

Mr. Sonenshine: Let me just make the proposition clear to your Honor that I have in mind. There may well be cases, probably have been, at least in the factual point of law, but I find no authority directly one way or the other, where a person is in possession of merchandise and there comes a time when, after possessing it he learns that it is stolen or possibly believes it to be stolen. I don't think at that point he becomes a criminal. I think there must be something in the nature of a hiatus or a locus penitentiae perhaps, when a person having possession of merchandise and comes upon information which leads him to believe that it might be stolen can disassociate himself from that merchandise without committing a crime.

> The Court: I don't know from the evidence in this case what you are going to argue to the jury as to when he discovered that the merchandise was stolen and how you are going to explain to the jury that when he did encounter policemen, instead of saying to the policeman, 'Look, I just found out that I have been driving a truck that contains stolen merchandise and its down at Busby Street, and I'll take you down there and show you where it is' how you explain instead of that that he wants to know from the policeman how do you get out of this town, 'How can I get a train or a bus?' You can spread this request at length on the record.'"

The Court thereupon proceeded to charge the jury as if the primary factual and legal issue for the defense did not exist.

To make matters worse, the Court made multiple references in its charge to the availability of the doctrine of recent possession as a potential basis for a determination by the jury that D'Avanzo knew the goods were stolen when he first entered the truck on Staten Island.

Yet, at no time in its charge did the Court in any manner inform the jury of the nature of the defense or what the applicable law was if they found that D'Avanzo first learned the goods were stolen when he reached Watertown and immediately upon acquiring such knowledge divested himself of further connection with them.

We respectfully urge that the Court's refusal to charge on the subject requested effectively took from the jury's consideration a meritorious defense offered by petitioner D'Avanzo.

POINT FOUR

The Evidence was Insufficient in Law to Establish Beyond a Reasonable Doubt that D'Avanzo knew the Truck or the Mercury were Stolen.

The pertinent events begin on June 3, 1969 when one Thomas Hawkins was driving a tractor-trailer containing the mercury in question. On that day, he picked up the mercury for his employer at a pier in Staten Island, with instructions to deliver it to another pier in Brooklyn for shipment to a foreign country.

While in Staten Island, enroute to Brooklyn, the tractor-trailer and its contents were hijacked. Two of the three hijackers were Negroes. He was uncertain as to whether the third was white or negro. He was subsequently shown photographs but could never identiy any of the robbers.

The Court instructed the jury that the appellants were not charged with the hijacking.

The empty tractor-trailer was recovered the following day.

On the afternoon of June 5, 1969, at the Caton Scrap Metal Yard in Staten Island, where D'Avanzo was employed, a large dump truck was observed leaving the yard.

The side door of the truck had the name Falcone on it. Falcone was a scrap and salvage dealer on Staten Island.

The truck was then followed by various F.B.I. agents in several cars along various highways until it reached the town of Watertown, Connecticut.

The truck which left the Caton Yard in Staten Island was observed by Agent Moresco who stated that although it ap-

peared heavily laden, he did not know what was in it, nor would it be unusual for a truck from a scrap metal or salvage company to be so heavily laden.

Agent Hays testified that he was one of the agents who followed the truck along the entire trip to Watertown. He testified that D'Avanzo was the driver and Falcone was the passenger.

Hays testified that the truck entered Watertown at Falls Avenue. At the first cross street, the truck started to turn right, then straightened out and continued along Falls Avenue for a few more blocks and turned right onto Busby Avenue where they parked the truck.

Hays described Busby Avenue as a horseshoe shaped residential street entering from Falls Avenue and exiting onto it again.

Hays saw the truck park and the lights from the truck flicked. At this point Hays left his car and walked over to another government car and spoke to the agents in that car.

Hays now saw two men about 40-50 yards from him walking towards him, where he was speaking to the other agents. These two men entered onto Falls Avenue from Busby Avenue, walked two or three steps, hesitated and turned across Falls Avenue at a trot and went off into a wooded area.

At this point, Hays returned to his own car, drove it to a position behind the truck. He climbed onto the hood of his car and looked inside the body of the truck with a flashlight. His footing was tenuous, so he got off the car, climbed up the side of the truck and used the flashlight to examine the contents of the body of the truck.

He next saw D'Avanzo about twenty minutes later, a mile away, on Main Street in Watertown. There D'Avanzo was placed under arrest for disorderly conduct by a Watertown Police Officer named Kennedy. Hays assisted in the arrest. No arrest was made by Hays of D'Avanzo in connection with the stolen merchandise. D'Avanzo was first arrested in the instant case about four months later.

Patrolman Kennedy testified that while on duty in a marked police car, he observed D'Avanzo running along Main Street. Kennedy pulled his car over toward D'Avanzo, at which point D'Avanzo turned and came over to the car. D'Avanzo said he was lost and wanted to know if there were any trains or buses running. Kennedy said there weren't any.

Kennedy then asked D'Avanzo for his name. D'Avanzo did not reply except to ask if there was a phone nearby. D'Avanzo was wet and perspiring.

Kennedy told D'Avanzo (untruthfully) that the gasoline station 50 yards down the street had a phone. D'Avanzo went toward it. Kennedy then radioed for assistance. As he did this, Hays came over with another agent in a car (459). They had a conversation and Kennedy, assisted by Hays, arrrested D'Avanzo for disorderly conduct and took him to the police station.

It is our position herein that this proof was insufficient in law to establish beyond a reasonable doubt that D'Avanzo (1) knew the truck was stolen and (2) knew the mercury was stolen.

(1) We consider first whether there was sufficient evidence to establish that D'Avanzo knew the truck was stolen.

The proof in this regard is sparse. The truck itself was in a materially different condition from the time of its original theft. When stolen, it was of the open flat type, having no sides or backing—only an open platform behind the cab. At the time of the theft of it on May 9, 1969 it did not have a dump type body built on to it, such as was found on June 5, 1969 when appellants were observed in it. There is no evidence in the record as to how the transition took place or when or by whom during the intervening month.

There is no evidence in the record as to the circumstances under which D'Avanzo came to be driving the truck. Hays testified that he had no knowledge of how long D'Avanzo had anything to do with the truck prior to entering in on Staten Island. The month long interval between the theft and D'Avanzo's presence in the truck was too long to be regarded as recent possession since trucks are easily bought and sold in the open market in such periods of time.

Nor is it insignificant that D'Avanzo was with Falcone in the truck and Falcone's name was on the door of the cab. Upon what basis could it then be said that D'Avanzo had knowledge beyond a reasonable doubt that he was driving a stolen truck?

(2) With respect to the mercury the proof of conscious possession coupled with knowledge is no stronger unless one seizes upon the conjecture that the recent theft implies knowledge from possession.

D'Avanzo was shown to be an employee of the Scrap Metal Company from whose yard the truck first emerged. There was no evidence presented by the Government as to any contact by D'Avanzo with the truck or its contents

prior to driving it out of the yard on the way to Watertown.

The truck itself made even casual knowledge of its contents difficult. The body was of solid steel or other metal extending to a height of approximately ten feet off the ground such that a person standing alongside it could not look into it to ascertain its contents (373). Hays, it will be recalled was only able to peer into the truck by climbing up on the hood of his own car or by climbing up the sides of the truck.

Most of the vials of mercury in the body of the truck were obscured by a tarpaulin. There was no evidence that D'Avanzo had himself even actually seen the vials or been told that they were stolen.

The vials themselves, even if seen, contained no name or other information from which one might surmise they were not lawfully in the possession of the Caton Scrap Metal Yard. Each vial bore only a number but no name.

We, therefore, submit that the proof adduced was not sufficient to establish beyond a reasonable doubt that appellant had knowledge that the mercury was in fact stolen. The motions to dismiss the indictment and for a judgment of acquittal at the end of the Government's case and at the end of the entire case should have been granted.

POINT FIVE

The Prosecutor's Summation was Inflammatory and Prejudicial to a Fair Trial for Petitioner D'Avanzo.

We urge herein that various remarks by the prosecutor during his summation were individually—and collectively—so inflammatory and improperly prejudicial as to have resulted in depriving appellant of a fair trial.

(a) The prosecutor made comments to the jury calculated to focus the jury's attention on the failure of appellant to testify.

Appellant D'Avanzo did not testify at the trial.

In the course of the prosecutor's summation the following occurred:

"Mr. Lynch: Your Honor, I had a comment to make about the charge that I hoped you were going to make.

The Court: Any argument you want to make you make, but do not do it in terms of what I am going to tell the jury.

That is my job.

It is my duty.

Mr. Lynch: In connection with a certain charge that the Judge will deliver to you, ladies and gentlemen, unless there is a—

The Court: Do not state it in terms of what you think I am going to charge the jury.

Mr. Lynch: No, I won't do that. Unless the defendants advance information you are satisfied with as an explanation that is consistent—

Mr. Sonenshine: If the Court pleases, in view of the last remarks by Mr. Lynch, I respectfully move for a mistrial.

The Court: I do not know how many motions you made for a mistrial, but this one is also denied.

Mr. Sonenshine: Exception, if the Court pleases.

Mr. Lynch: I submit to you ladies and gentlemen that the defendants haven't advanced any explanation consistent with innocence about their possession of this mercury or this truck.

Mr. Sonenshine: I renew my motion and objection.

The Court: Again your motion for a mistrial is denied.

Mr. Sonenshine: Exception.

The Court: When the time comes, ladies and gentlemen, my charge will include a charge with reference to stolen merchandise, if it is recently stolen and found in the possession of a person, what effect may be given and what inferences may be or may not be drawn by the jury.

You will please leave the charge to the Court on this subject as well as any other subjects.

Please, go ahead."

We are, of course, cognizant of the rule dealing with "unexplained" possession of recently stolen merchandise, We do not, however, take that doctrine to mean "unexplained by the defendant's own testimony" since such a rule would conflict with the Fifth Amendment. The "explanation" referred to may suffice if it springs from the circumstances adduced from any of the evidence in the case, including the prosecution's witnesses.

A prosecutor who seeks in summation to argue for the drawing of inferences adverse to a defendant from his allegedly unexplained possession of stolen goods trods a dangerously thin line.

In the case at bar, the prosecutor crossed the line bounding the dubious safety of the recent possession doctrine and

entered into the prohibited area of impermissible references to the accused's failure to testify. His above quoted remarks were virtually unequivocal references to the defendant's own failure "to advance any explanation consistent with innocence". As such, the jury could only take it to be a comment on the accused's failure to testify (*Griffin* v. *State of California*, 85 S. Ct. 1229, 380 U. S. 609; *U. S. ex rel D'Ambrosio* v. *Fay*, 349 F. 2d 957 [2 Cir., 1965]).

(b) The prosecutor made improper comments on matters not within the evidence.

During the trial, a government witness, F.B.I. Agent Moresco, was asked what he did after observing that the truck had the name "Falcone" on its door. His answer, gratuitous and unresponsive, was "Well, I recalled my previous association with Falcone". Upon objection, the remark was stricken and the jury instructed to disregard it. Motions for a severance or a mistrial were denied.

During his summation, the prosecutor told the jury:

> "Agent Moresco also stated he observed the name Falcone on the side of the truck in white *and he further told you that he recalled that he knew Falcone from an interview he had conducted with the defendant a few months previous.* He testified that he then alerted his brother officers."

Objection was made by counsel for D'Avanzo upon the ground that it prejudiced D'Avanzo. The trial Court disagreed.

As indicated, there was no evidence in the case that Moresco had "interviewed" Falcone. The real vice, however, goes beyond that. Falcone was a defendant before the jury. He was already suspect. His fate hung in the balance

on the issue of reasonable doubt. D'Avanzo was linked with him as an alleged co-adventurer in an illicit enterprise. That which improperly damaged Falcone could easily prejudice D'Avanzo with equal damage. To allow the prosecutor to capitalize on the obviously sinister connotation of an "interview" of a defendant in some other unrelated matter could only prejudice D'Avanzo. Particularly is this so where the Court had earlier instructed the jury to disregard the testimony and now condones it.

In all of the circumstances we submit that the prosecutor's summation improperly prejudiced petitioner D'Avanzo.

CONCLUSION

The Judgment of Conviction of Petitioner D'Avanzo Should be Reversed and the Indictment Dismissed or a New Trial Ordered.

Respectfully submitted,

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EVSEROFF, NEWMAN & SONENSHINE
Of Counsel

APPENDIX A

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of June one thousand nine hundred and seventy-one.

Present:

HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
HON. WALTER R. MANSFIELD,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEWIS VINCENT D'AVANZO AND VINCENT ANTHONY FALCONE,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Appendix A—Judgment of Affirmance of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX B

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 961, 962—September Term, 1970.

(Submitted May 26, 1971 Decided June 9, 1971.)

Docket Nos. 71-1012, 71-1029

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

LEWIS VINCENT D'AVANZO and
VINCENT ANTHONY FALCONE,

Defendants-Appellants.

Before:

KAUFMAN and ANDERSON, *Circuit Judges,* and
MANSFIELD,* *District Judge.*

Appeals from convictions after a jury trial in the United States District Court for the Eastern District of New York, before Joseph C. Zavatt, *District Judge,* for possessing mercury cylinders stolen from an interstate shipment, 18 U.S.C. §659, transporting a stolen truck in interstate commerce, 18 U.S.C. §2312, and transporting stolen mercury in interstate commerce, 18 U.S.C. §2314.

Affirmed.

* Of the United States District Court for the Southern District of New York, sitting by designation.

Appendix B—Opinion of the United States Court of Appeals

MAURICE EDELBAUM, New York, N. Y. (Lawrence K. Feitell, of counsel), *for defendant-appellant Falcone.*

EVSEROFF, NEWMAN & SONENSHINE, Brooklyn, New York (William Sonenshine, of counsel), *for defendant-appellant D'Avanzo.*

MERVYN HAMBURG, Attorney, United States Department of Justice, Washington, D. C. (Edward Neaher, United States Attorney, Eastern District of New York, on the brief), *for plaintiff-appellee.*

PER CURIAM:

Appellants were convicted by a jury and subsequently sentenced under three counts of a four-count indictment, for possessing and transporting in interstate commerce, and in a truck whose cab had been stolen, a quantity of some 326 mercury cylinders which had previously been hijacked. The cylinders were being transported from a pier in Staten Island, New York, where they had arrived by ship in May 1969, to another pier in Brooklyn. The truck from which the cylinders were stolen was recovered the day after the hijacking.

Viewing the evidence most favorably to the Government, as we must at this juncture, *United States* v. *Kahaner*, 317 F.2d 459, 467 (2d Cir. 1963), *cert. denied* sub nom. *Corallo* v. *United States*, 375 U.S. 835 (1963), the proof at trial adequately supported defendants' convictions. Neither defendant was identified as a participant in the thefts either

of the mercury cylinders or of the truck. Shortly after the cylinders (each of which weighed about 100 pounds) had been reported stolen, FBI agent George Moresco observed an International truck cab with a dump-truck type body (open on top) riding low on its axles and thus obviously carrying a heavy load, parked in front of a scrap metal yard on Staten Island. The truck was placed under surveillance and several agents followed it closely as the truck proceeded north from Staten Island via the Connecticut Turnpike to Watertown, Connecticut. During the course of this journey, FBI agent James Hays was able many times to observe D'Avanzo driving the truck and Falcone sitting in the passenger seat.

After the truck entered Watertown at about 2:30 a.m. on June 6, D'Avanzo appeared to be getting ready to turn into a street leading to the Infeld Metal Company but then for some reason changed his mind and proceeded ahead for two more blocks before turning into a U-shaped residential street, Bessamy Avenue,[1] which led nowhere but back to the road upon which the truck had been traveling, Falls Avenue. D'Avanzo parked a short distance down Bessamy Avenue. While several FBI agents remained in another car on Falls Avenue (contiguous to Bessamy), Agent Hays stopped his car short of Bessamy Avenue and walked toward the other FBI vehicle, whose headlights were on. The agents saw appellants leave the truck and walk in their direction for a short distance. But then, as they approached Hays, both turned in the opposite direc-

[1] From among many different versions in the record of the name of this street, we have adopted that form used by the parties in this appeal.

tion and proceeded at a trot into a swampy wooded area behind Bessamy Avenue.

Their retreat prompted Agent Hays to inspect the inside of the truck with his flashlight. The panels were sufficiently high that it was necessary for him to stand on a ledge running around the body of the truck in order to view, through the open top, the exposed interior of the dump truck. Without disturbing a tarpaulin that covered only part of the truck's cargo, Hays was able to observe several exposed cylinders, later identified as part of the stolen shipment of mercury cylinders. Further investigation revealed that the serial number on the motor of the truck corresponded with that of a 1969 flat-bed International truck stolen from the Port Equipment Renting Co. in March 1969. Under a layer of fresh paint on the left door of the cab the name "Port Equipment Renting Co." was still visible.

Prior to the trial, Judge Zavatt conducted a hearing on D'Avanzo's motion to suppress the fruits of the search and seizure of the truck and its contents on the ground that Agent Hays acted without a warrant. After a hearing, Judge Zavatt ruled that the defendants had "abandoned" the truck and its contents prior to Hays's inspection and thus there had been no "search and seizure" within the meaning of the Fourth Amendment to which appellants could object. Whether there has been an abandonment presents a question of intent. Like other factual findings by a district court we may disturb Judge Zavatt's finding that defendants relinquished any interest they may otherwise have had in protecting the privacy of the exposed

portion of the dump truck only if the finding is clearly erroneous. *United States* v. *Cowan*, 396 F.2d 83, 87-88 (1969). Under the circumstances present here we believe Judge Zavatt's finding was not clearly erroneous. Hays's inspection invaded no aspect of the defendants' legitimate interests in privacy. In arriving at this conclusion, we have considered, in addition to defendants' flight into the woods and the attendant circumstances, the minimal intrusion into the truck that resulted from Hays's inspection. We are mindful also that traditionally, as the Supreme Court has recently had occasion to reaffirm, "there is a constitutional difference between houses and cars." *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970). After Hays had observed a number of the cylinders in plain view, moreover, probable cause existed for the more thorough search of the truck which was conducted on the following day.

We have examined appellants' other points and find them without merit.

The convictions are affirmed.

APPENDIX C

Fourth Amendment to the United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

APPENDIX D

Title 18 U. S. Code

TITLE 18 U. S. CODE, § 659:

§ 659. Interstate or foreign shipments by carrier:

"Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any * * * motortruck, or other vehicle, * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both."

TITLE 18 U. S. CODE, § 2312:

§ 2312. Transportation of stolen vehicles:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined nor more than $5,000 or imprisoned not more than five years, or both."

TITLE 18 U. S. CODE, § 2314:

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *

Shall be fined nor more that $10,000 or imprisoned no more than ten years, or both."

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441-396—71——2

In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71–22 and 71–44

LEWIS VINCENT D'AVANZO, PETITIONER

v.

UNITED STATES OF AMERICA

VINCENT ANTHONY FALCONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 71–22, App. B; Pet. No. 71–44, App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. No. 71–22, App. A; Pet. No. 71–44, App. A) was entered on June 9, 1971. The petition for a writ of certiorari in No. 71–22 was filed on July 6, 1971; the petition in No.

441-396—71——1

71-44 was filed on July 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case, federal agents could properly look into the open-topped body of petitioners' truck, immediately after it had been parked on a public street and petitioners had fled on foot, in an effort to ascertain the nature of the extremely heavy cargo that was being transported.

2. Whether a comment by the trial judge to the jury regarding his ruling in a pretrial hearing deprived petitioners of a fair trial.

3. Whether the trial court's instructions to the jury were erroneous.

4. Whether certain statements by the prosecutor during his summation were prejudicial.

5. Whether the evidence is sufficient to support the conviction of petitioner D'Avanzo on all counts.

STATEMENT

After a joint trial by jury in the United States District Court for the Eastern District of New York, petitioners were convicted on the first three counts of a four-count indictment, charging them with possessing a quantity of mercury stolen from a shipment consigned in foreign commerce, in violation of 18 U.S.C. 659 (count 1), transporting a stolen truck in interstate commerce, in violation of 18 U.S.C. 2312 (count 2), transporting stolen mercury in interstate commerce, in violation of 18 U.S.C. 2314 (count 3), and concealing the stolen mercury, in violation of 18 U.S.C. 2315

(count 4).[1] On December 4, 1970, petitioner D'Avanzo was sentenced to concurrent terms of imprisonment for ten years under counts 1 and 3, subject to the parole provisions of 18 U.S.C. 4208(a)(2); petitioner Falcone was sentenced to concurrent terms of imprisonment for five years on counts 1 and 3, also subject to 18 U.S.C. 4208(a)(2). On count 2, the sentence was probation for five years as to D'Avanzo and for three years as to Falcone. The court of appeals affirmed *per curiam* (Pet. No. 71–22; App. B; Pet. No. 71–44, App. B).

In May 1969, a ship containing as part of its cargo 400 cylinders of mercury arrived at Pier 20, Staten Island, New York. Each cylinder weighed approximately 100 pounds and was the size of an oxygen tank (Tr. 225–230, 565). On June 3, 1969, a truck laden with the cylinders of mercury was hijacked (Tr. 236). The police were notified and, later that day, they located the truck, now empty, in Brooklyn near the Verrazano Bridge (H. 268). The fuel guage indicated that the hijackers had not driven the truck very far (H. 272; Tr. 240). Accordingly, a number of F.B.I. agents were assigned surveillance duty in the Staten Island area to watch various warehouses and trucking companies (Tr. 254).

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[1] The trial court dismissed count 4 on its own motion at the end of the case (C. 4). "C." refers to the transcript of the court's closing charge, which has been paginated separately from the transcript of trial ("Tr."). The transcript of a pretrial hearing on petitioners' motion to suppress is referred to as "H." We are lodging these transcripts with the Clerk of this Court.

At about 7:00 p.m. on the evening of June 5, 1969, Agent George Moresco observed a large truck, which resembled a dump-truck and had the name "Falcone" written in white on its cab, parked in front of the Caton Scrap Metal Yard. The body was enclosed on three sides but had no top (Tr. 264).[2] The agent noticed that the rear axle was low, indicating that the truck contained a heavy load (Tr. 268).

Shortly thereafter, the truck emerged from the Caton Metal Yard gate; Moresco and other agents followed. At a service station not far from the Goethels Bridge in New Jersey the truck stopped and the driver, later identified as petitioner D'Avanzo (Tr. 304),[3] made a telephone call. He then drove north, stopping next at a diner near the George Washington Bridge; he again made a telephone call (Tr. 301). Thereafter D'Avanzo and his passenger, petitioner Falcone, drove across the bridge and proceeded to the Connecticut Turnpike. On the turnpike near Darien, Connecticut, D'Avanzo made another stop at a restaurant. After making a third telephone call, and conversing with an unidentified individual seated in a car and with the driver of a truck which bore the inscription "Infield Metals Company" (Tr. 272, 305; H. 215), D'Avanzo, still accompanied by Falcone, drove the truck to the Bridgeport exit. He there left the turnpike and, still followed by federal agents, proceeded on state roads to Watertown, Connecticut, arriving there at approximately 2:00 a.m.

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[2] As expained below (p. 8 *infra*), at that time, the agent had reason to regard Falcone, a scrap metal operator, as a possible suspect involved in the disposition of stolen mercury.

[3] D'Avanzo was employed at the Caton Scrap Metal Yard (H. 276).

In Watertown, the agents observed the truck start to turn onto the street where the Infeld Metals Company was located; however, it then continued on for a few blocks and turned into a U-shaped residential street, where it was parked. The agents observed petitioners leave the truck and walk in their direction. As they approached Agent James Hays, they stopped, hesitated, and then turned and headed at a trot in the opposite direction into a swampy wooded area (Tr. 311, 571–573).

Agent Hays then drove his car to the truck and parked. Because the side panels were too high for him to see inside from street level, he climbed onto a ledge on the side of the truck and, using a flashlight, looked into the open top. Agent Hays observed that the truck's cargo was largely covered by a tarpaulin; without disturbing the tarpaulin, however, he could see four or five cylinders that were exposed. The agent recognized the unmarked cylinders as a type which usually contained chemicals (Tr. 312–313).

Agent Hays then assigned other agents to remain at the site of the parked truck; he set out to find petitioners. Approximately twenty minutes later, Hays learned from a local policeman, Thomas Kennedy, that Kennedy had just stopped an individual approximately a mile from the parked truck and had asked what he was doing in the area at that time of night. The individual had stated that he was hitchhiking; he had inquired about trains or buses that he could board at that time. When Kennedy replied that there were none, the individual asked for the location of a telephone booth. Kennedy had directed him to a gaso-

line station and had then radioed for assistance in apprehending the individual for disorderly conduct. Hays agreed to assist in the arrest. The two officers proceeded to the service station and Hays helped Kennedy take D'Avanzo into local custody at about 3:00 a.m. (H. 230–233; Tr. 313–314). At this time D'Avanzo's clothes were disheveled, he was perspiring heavily, and his trousers were wet up to the knees (Tr. 321).

Prior to arresting D'Avanzo, Officer Kennedy told Agent Hays that he had also seen an individual fitting the description of Falcone proceeding in the opposite direction (Tr. 468–469). At approximately 5:00 a.m., local police officer Michael Ezzo, who had earlier responded to Kennedy's request for aid and had been given a description of Falcone (H. 49–53), saw Falcone walking. Ezzo noticed that the lower portion of Falcone's trousers were wet (H. 56). He stopped Falcone and asked his name and where he was going. Falcone identified himself and replied that his car had broken down as he was heading toward his sister's home in Westhaven. Ezzo indicated that Westhaven was in the opposite direction. Falcone then said that he was unsure of himself because he had been drinking too much. Although Falcone did not appear to be intoxicated, Ezzo arrested him on charges of intoxication and disorderly conduct, and took Falcone into local custody (Tr. 530–536). This arrest occurred approximately a mile and a half from the site of the parked truck (Tr. 537).

Later that morning F.B.I. agents counted 326 cylinders of mercury in the truck (Govt's Exh. 30;

Tr. 558–560). D'Avanzo's fingerprints were found on the left side of the cab's interior (Tr. 425–450, 484–495; Govt's Exhs. 18–23). The left door of the truck had been freshly painted, and under the paint the inscription "Port Equipment Renting Co." was still visible (Tr. 586–587).[4] The cab portion of the truck had been stolen in Brooklyn on May 9, 1969, while in use by a driver for the Port Equipment Renting Company. At that time it was a flat-bed truck with no dump container attached (Tr. 638–641, 660–668). The vehicle identification number on the door-post also differed from the serial number on the truck motor (Tr. 645–651, 667).

ARGUMENT

1. Petitioners separately challenge the conclusion of the court below that the "search" of the truck was lawful.[5] The viewing of the contents of the truck in Watertown by Agent Hays was not, we believe, a search within the meaning of the Fourth Amendment. The act of climbing onto the side of the truck, which was riding low on its axles and thus was clearly heavily laden, to see what might be exposed to plain view inside the open-topped body is not so unexpected or unusual, nor conducted in such a way, as to be an invasion of privacy. See *United States* v. *Lee*, 274 U.S. 559.

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[4] The name "Falcone", which had appeared in white letters on the cab of the truck when it was first spotted in front of the Caton Scrap Metal yard before the [illegible] began their surveillance, had been removed (Tr. 287, 54[illegible]61).

[5] That argument, however, is foreclosed to petitioner Falcone. He explicitly declined to join petitioner D'Avanzo's pre-trial motion to suppress (H. 9) and never raised the issue in the court of appeals.

A. In any event, there was probable cause for Agent Hays' examination. At the time that he viewed the uncovered cylinders in the back of the truck, F.B.I. agents knew of the hijacking of cylinders of mercury on June 3, 1969; they also know about a similar hijacking eight months earlier. In the period between the two hijackings, the agents, although unable to amass sufficient information to bring charges against Falcone, had gathered credible information that Falcone had been involved in the disposition of the prior shipment of stolen mercury (H. 185–187). When the agents learned of the later theft of mercury, they regarded Falcone as a possible suspect, especially since he operated a scrap metal yard a few blocks from the site of the second hijacking (H. 185). Moreover, the manager of a trucking company located across the street from Falcone's place of business had informed an F.B.I. agent that a week before the second hijacking Falcone had asked the manager whether he handled mercury (H. 272–274). The agents thus had good reason to place under surveillance the dump truck, obviously heavily laden, which, when first observed, bore the name "Falcone" on one side (H. 145, 148).

During its trip to Watertown, Connecticut, the truck was in the sight of one or more federal agents. One agent, who had driven close enough to see the occupants of the truck, described them to the other agents. Agent Moresco, who knew Falcone to be a particularly heavy individual, radioed the others that one of the men just described "sounded very much like Vincent Falcone" (H. 194).

The parking of the heavily-laden truck on a U-shaped street in a residential neighborhood in the early hours of the morning, and the flight of its occupants into the woods, coupled with the prior information about Falcone, justified the finding of probable cause. See *Chambers* v. *Maroney*, 399 U.S. 42, 48.[6] In making this determination, knowledge received by one officer is properly imputable to the others. Contrary to the argument of petitioner D'Avanzo (Pet. No. 71–22, p. 12), it is irrelevant that the inspection of the truck was not personally conducted by the agent who had initiated the surveillance, or by the one who had testified as to the information regarding Falcone's connection with the prior theft of mercury. The agents were acting, not as separate individuals, but as a unit in a common undertaking. *Smith* v. *United States*, 358 F.2d 833 (C.A. D.C.), certiorari denied, 386 U.S. 1008; *United States* v. *Romero*, 249 F.2d 371 (C.A. 2); *United States* v. *Pitt*, 382 F.2d 322, 324–325 (C.A. 4); see *United States* v. *Ventresca*, 380 U.S. 102, 111.

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[6] Petitioner Falcone's reliance on *Coolidge* v. *New Hampshire*, No. 323, October Term 1970, decided June 21, 1971, is misplaced. In the instant case, unlike *Coolidge*, the truck was parked on a public street in a residential area which was clearly not its intended destination; there was every indication that it would be moved again before it was unloaded. It had been driven from Staten Island, New York, to Watertown, Connecticut for what could reasonably be believed to be an illegal purpose. The driver and his passenger, far from being cooperative with the federal agents, fled the scene when the agents approached. Thus, this case is materially different from *Coolidge* on its facts and the decision by this Court in that case is inapposite here.

B. Moreover, as the district court found, petitioners' conduct on their arrival in Watertown, Connecticut, could properly be viewed as manifesting an intent to abandon the stolen truck. The facts that they parked the vehicle in a residential area and ran from the site, that they never mentioned it when confronted by the police officers shortly thereafter but, instead, indicated that they were on the street at that early hour in the morning because they had no available mode of transportation, and that they never subsequently attempted to regain possession of the truck nor admitted any possessory interest in the vehicle, all support the conclusion that they had abandoned it.

In resolving the issue of abandonment, the court's examination is not restricted to the facts known to the officers at the time of the search (Pet. No. 71-22, p. 15). Rather, the critical question is whether the truck was in fact abandoned at that time by its occupants. If so, no rights of privacy under the Fourth Amendment would have been violated, and the situation would not be one calling for the application of an exclusionary rule. The conduct of petitioners in leaving the parked vehicle, and their actions thereafter, would therefore be relevant to determine whether they had manifested an intent to abandon the truck. See *Parman* v. *United States*, 399 F.2d 559 (C.A. D.C.), certiorari denied, 393 U.S. 858.

Even though the search of the truck occurred prior to the expiration of a period of time which must pass before the State law will regard a parked vehicle as having been abandoned (Pet. No. 71-22, p. 14), that statute was not the controlling standard for determining the issue of abandonment.

2. During direct examination of the police officer who had arrested Falcone in Watertown on a charge of disorderly conduct and intoxication, counsel for Falcone requested the court to charge that the arrest had been illegal.[8] The court complied by stating (Tr. 538):

> I must tell you, ladies and gentlemen, that I conducted a pretrial hearing and that I ruled that if a person is running down the street or is walking on the street at 5:00 o'clock in the morning, or 3:00 o'clock in the morning, that I do not think that is a crime of disorderly conduct, and therefore when both of these defendants were arrested on that charge by the Watertown police that any statements that may have been made by either of these defendants after they were placed under arrest would not be admissible on this trial.

Counsel for D'Avanzo objected on the ground that the court's remark suggested that "there were or might have been statements made by the defendants that Your Honor has excluded" (Tr. 538–539), and therefore it amounted to an unfair comment on the failure of the defendants to testify. In overruling the objection, the trial court pointed out that the hearing had not been held for the purpose of determining the lawfulness of the arrest, but rather to ascertain whether

[8] At the hearing on D'Avanzo's pretrial motion to suppress, the court had concluded that petitioners' arrests on the streets of Watertown on charges of disorderly conduct and intoxication were unlawful, and that statements obtained as a result of those arrests would be inadmissible (Sept. 21, 1970 Tr. 7).

any evidence following the arrest was admissible (Tr. 539).

Petitioners claim (Pet. No. 71–22, pp. 16–19; Pet. No. 71–44, pp. 17–20) that the court's comment was prejudicial error. We cannot agree. Certainly the court's statement that Falcone's conduct did not justify an arrest for disorderly conduct was not prejudicial to petitioners. Its additional admonition to the jury that any statements "that may have been made" by either petitioner after an unjustified arrest "would not be admissible on this trial" carried with it no implication that incriminating admissions had in fact been made after arrest which were being withheld from the jury.[9]

3. Both petitioners attack what they deem to be omissions in the court's final charge.

A. Pointing to the reference to 18 U.S.C. 2 in each count of the indictment and the absence of evidence that Falcone had driven the truck which had transported the stolen mercury to Watertown, petitioner Falcone now claims fatal error in the court's failure to give an aiding and abetting instruction (Pet. No. 71–44, p. 11). No request to charge on aiding and abetting was made at trial, however, and no objection to the failure to give such a charge was interjected at the close of final instructions. Petitioner is, therefore, foreclosed by Rule 30, F.R.Cr. P., from assigning as error "any portion of the charge or omission therefore." Indeed, here the absence of such a request by Falcone's counsel might well have been an element of strategy, since

[9] The cases cited by appellants are inapposite. Most involve comments by a prosecutor in closing argument to the effect that he has evidence beyond that introduced in the case which would establish the defendant's guilt.

such an instruction would have allowed the jury to consider Falcone's guilt or innocence on a broader theory.

Similarly, petitioner Falcone's trial counsel did not request additional instructions on what constitutes "possession." The failure of the court *sua sponte* to give detailed instructions on this term of common usage does not constitute plain error.

B. Petitioner D'Avanzo argues that he was entitled to an instruction, which he proferred, to the effect that, if the jury found that he had divested himself of the truck that he was driving upon learning that it and its contents were stolen, he should be acquitted (Pet. No. 71–22, pp. 19–23). This request to charge was based upon his counsel's final argument, and upon the proof that he left the truck in Watertown and never returned to it.[10] But D'Avanzo's flight from the truck on seeing the federal agents, and his failure thereafter to return to it, does not indicate that he was unaware of the stolen nature of the property during the long drive to Watertown. Indeed, his several telephone calls in route, and the conversation with two unidentified men at the restaurant in Darien, Connecticut (*supra,* p. 4), suggest otherwise. Thus, the court properly rejected an instruction grounded solely upon an argument of counsel but totally unsupported by evidence. See *United States* v. *DeAlessandro,* 361 F. 2d 694 (C.A. 2), certiorari denied, 385 U.S. 842; *United States* v. *Gosser,* 339 F. 2d 102 (C.A. 6), certiorari denied, 382 U.S. 819.

[10] Neither petitioner presented any evidence at trial.

4. Petitioners also assign as reversible errors certain comments by the prosecutor during his closing argument. The contention is unfounded. Government counsel first outlined his burden of proving every essential element; he then reviewed the testimony of the witnesses, showing how their testimony applied to each count of the indictment (Tr. 752–774). Near the conclusion of his presentation, he referred to the testimony regarding petitioners' separate explanations to the local police preceding their arrests during the early morning hours of June 6 on charges of disorderly conduct. After suggesting that both men had lied to the police, counsel stated rhetorically, "Have we heard any evidence that the defendants subsequently went up to Watertown, Connecticut, to claim the mercury in the truck?" (Tr. 795). Objections to that comment were overruled (Tr. 796).

Government counsel then noted that, during the trial, the jury might have considered the possibility that petitioners were unaware that the truck in which they rode, or its cargo, had been stolen. He then attempted to dispel any such notion by suggesting that transporters of heavy cargo would want to know the nature of their load; and that petitioners, both of whom were involved in the scrap metal and salvage business, would be aware of the value of mercury. After objections to this argument were overruled, counsel made reference to the court's proposed charge regarding the inference of knowledge to be drawn from proof of possession of recently stolen property. The following then occurred (Tr. 800–802):

Mr. Lynch (government counsel): Ladies and gentlemen, the Judge in his charge will instruct you so that you may infer that the mere possession of recently stolen property is guilty possession, unless a satisfactory explanation—

The Court: Why don't you stop telling the jury the judge's job. Not only you, Mr. Kestnbaum and Mr. Sonenshine (defense counsel). My function is to charge the jury as to the law. Don't you tell them in advance what I am going to charge.

Mr. Lynch: Your Honor, I had a comment to make about the charge that I hoped you were going to make.

The Court: Any argument you want to make you make, but do not do it in terms of what I am going to tell the jury.

That is my job.

It is my duty.

Mr. Lynch: In connection with a certain charge that the Judge will deliver to you, ladies and gentlemen, unless there is a——

The Court: Do not state it in terms of what you think I am going to charge the jury.

Mr. Lynch: No, I won't do that. Unless the defendants advance information you are satisfied with as an explanation that is consistent——

Mr. Sonenshine: If the Court pleases, in view of the last remarks by Mr. Lynch, I respectfully move for a mistrial.

The Court: I do not now how many motions you made for a mistrial, but this one is also denied.

Mr. Sonenshine: Exception, if the Court pleases.

> Mr. Lynch: I submit to you ladies and gentlemen that the defendants haven't advanced any explanation consistent with innocence about their possession of this mercury or this truck.
>
> Mr. Sonenshine: I renew my motion and objection.
>
> The Court: Again your motion for a mistrial is denied.
>
> Mr. Sonenshine: Exception.
>
> The Court: When the time comes, ladies and gentlemen, my charge will include a charge with reference to stolen merchandise; if it is recently stolen and found in the possession of a person, what effect may be given and what inferences may be or may not be drawn by the jury.
>
> You will please leave the charge to the Court on this subject as well as any other subjects.

This colloquy demonstrates that the comments by the prosecutor, to the effect that the "defendants" had failed to "advance information" consistent with innocent possession of the mercury, related to the permissible inference that could be drawn from the fact of possession. It plainly was not a comment on the failure of petitioners to testify.

5. Contrary to petitioner D'Avanzo's contention, the evidence is legally sufficient to support his convictions for transporting the mercury and the truck in interstate commerce with knowledge of their stolen nature, and for possession of the stolen mercury. There is no dispute that D'Avanzo drove the stolen truck from

Staten Island to Watertown. Apart from the inference to be drawn from a finding that he possessed the truck and the mercury, the jury could properly have inferred knowledge from his behavior en route (*supra*, pp. 4–5) and his flight in Watertown.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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